permitted upon any pretext," *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). "Regardless of the carrier's motive – whether it seeks to benefit or harm a particular customer – the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.' " *Central Office Tel.*, 524 U.S. at 223 (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229-30 (1994)).

Any ruling exempting PointOne and similarly situated carriers from access charges would run headlong into this doctrine. Again, these providers stand in the same shoes as other wholesale providers of transmission service that carry PSTN-to-PSTN calls and that pay access charges for their "use [of] local exchange switching facilities" in completing those calls. 47 C.F.R. § 69.5(b); *see* Dignan Decl. ¶ 6. If these providers were exempt from access charges, it would result in "similarly situated customers pay[ing] different rates for the same services," which in turn would violate the policy of antidiscrimination that is central to the filed rate doctrine. *Central Office Tel.*, 524 U.S. at 223.

Indeed, the Commission has already stressed its "concern that disparate treatment of voice services that both use IP technology and interconnect with the PSTN could have competitive implications." *AT&T Order* ¶ 19. The Commission further noted in the *AT&T Order* that the application of access charges to calls carried by multiple service providers was necessary to ensure that no carrier was placed at a "competitive disadvantage" and "to remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.*; *see also id.* ¶ 17 ("we see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules"). These observations are correct, and they compel the conclusion that,

when wholesale transmission providers that use IP technology transmit interexchange calls that originate and terminate on the PSTN, they, just like non-IP-based wholesalers, are acting as "interexchange carriers" for purposes of Rule 69.5(b) and are accordingly liable for access charges.

B. The Claim That Wholesale Providers Using IP Technology Are Not "Common Carriers" Is Incorrect and Irrelevant

PointOne has taken the position that it is not a "common carrier" and accordingly cannot be considered an "interexchange carrier" for purposes of Rule 69.5(b).[27] But the available evidence makes clear that PointOne is in fact a "common carrier" under Commission precedent. And, in any case, nothing in the Commission's rules suggests that common carrier status is a prerequisite to liability for access charges.

1. PointOne and other similarly situated carriers are common carriers. Thus, even if the term "interexchange carrier" in Rule 69.5(b) is confined to "common carriers," these providers are still liable for access charges.

As a threshold matter, even assuming that these carriers are purely wholesale providers that do not offer retail service to end users, that is immaterial to their classification as "common carriers." It is settled law that "[c]ommon carrier services may be offered on a retail or wholesale basis because common carrier status turns not on *who* the carrier serves, but on *how* the carrier serves its customers." *Triennial Review Order*[28] ¶ 153; *see, e.g., Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 930 (D.C. Cir. 1999) ("the Commission never relies on a wholesale-retail distinction" in determining whether an entity is a common carrier); *Non-*

[27] *See* PointOne Motion To Dismiss Mem. at 10-14.

[28] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313, 316, 345 (2004)

Accounting Safeguards Order[29] ¶ 263 ("common carrier services . . . include wholesale services to other carriers"); Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 787 (1997) (stressing the "broad classes of telecommunications carriers," including, *inter alia*, "wholesalers"), *aff'd in part, rev'd and remanded in part, Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999).

The question, then, is not whether these carriers' offer service to end users, but rather is whether the transmission they provide to other carriers is offered to all comers. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1975) ("*NARUC I*") ("The key factor is that the operator offer indiscriminate service to whatever public its service may legally and practically be of use."); Order on Remand, *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 571, ¶ 7 (2000) ("*Universal Service Remand Order*") ("[U]nder *NARUC I*, a carrier offering its services only to a legally defined class of users may still be a common carrier if it holds itself out indiscriminately to serve all within that class."), *aff'd, United States Telecom Ass'n v. FCC*, 295 F.3d 1326 (D.C. Cir. 2002).

That test is plainly satisfied here. By its own admission, PointOne offers transmission service to all manner of customers, "including interexchange and local exchange carriers, cable systems, wireless providers, ISPs, enterprise customers, multimedia companies and residences."[30] Indeed, PointOne touts the fact that it provides "'*any-to-any*' services," meaning that "PointOne transmits and routes traffic between *any* origination and termination device (including phones, computers, PDAs, wireless devices, etc.) *without discriminating* based on the

---

[29] First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905 (1996) ("*Non-Accounting Safeguards Order*"), *modified on recon.*, 12 FCC Rcd 2297, *further recon.*, 12 FCC Rcd 8653 (1997).

[30] Pies Letter at 4.

form or capability of the device."[31] PointOne offers that nondiscriminatory service, moreover, on standardized terms, as evidenced by its August 2005 "final and formal notification" of its "new effective per minute rate" for various transmission services "effective across the entire PointOne customer base."[32] This evidence makes clear that, far from offering individualized service to a "significantly restricted class of users,"[33] PointOne offers standardized terms to a wide range of customers. It follows that PointOne qualifies as a common carrier under Commission precedent. *See, e.g., Universal Service Remand Order* ¶¶ 7-8, 13.[34]

There is, moreover, no countervailing evidence. Although PointOne has stated in conclusory terms that it is not a "common carrier," it has never produced any evidence to support that assertion. It has not, for example, identified the specific customers to whom it provides wholesale transmission or the rates at which it does so, nor, to the SBC ILECs' knowledge, has it complied with its obligation to produce its contracts with those customers to permit this Commission to assess whether it is properly designated as a common carrier. *See* 47 U.S.C. § 211. Likewise, PointOne has not identified with precision the service offerings it makes to potential customers or provided evidence to indicate the variability (if any) in these offerings. It is established law that, "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *E.g.*,

---

[31] *Id.* (emphases added).

[32] PointOne Rate Notice.

[33] Cable Landing License, *AT&T Submarine Systems, Inc. Application for a License To Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, 11 FCC Rcd 14885, ¶ 25 (1996).

[34] Transcom likewise offers transmission service indiscriminately to a wide range of customers. *See* Transcript of Proceedings at 988-990, 1006, *In re Transcom Enhanced Services, LLC*, Bk. No. 05-31929-HDH-11 (Bankr. N.D. Tex. Mar. 29, 2005) (Transcom CEO Scott Birdwell) (Ex. J) (testifying that Transcom offers transmission service to interexchange carriers and that it does not "pick and choose . . . whether to carry an individual's call").

International Union, United Auto. Workers v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972); *see Alabama Power Co. v. FPC*, 511 F.2d 383, 391 n.14 (D.C. Cir. 1974). The failure of PointOne to date to provide evidence that would shed light on its regulatory status – and its reliance instead on self-serving conclusory statements – only confirms that it provides service to all comers on standardized terms and accordingly qualifies as a common carrier.

Nor, finally, can PointOne or similar carriers escape common carrier classification by contending that the calls they carry are "enhanced" services entitled to the ESP Exemption. Again, the *AT&T Order* stands decisively for the proposition that any "interexchange" telephone call is a "telecommunications service" subject to access charges provided that (1) the calling party "uses ordinary customer premises equipment (CPE) with no enhanced functionality"; (2) the call "originates and terminates on the public switched telephone network (PSTN)"; and (3) the call "undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *AT&T Order* ¶ 1. The Commission further held that its analysis applies where, as here, "multiple service providers are involved in providing IP transport." *Id.* ¶ 19. Thus, irrespective of any other services PointOne may offer, when it provides long-haul transport of ordinary telephone calls that originate and terminate on the PSTN, it is providing an interexchange service, not an enhanced service, and it is therefore liable for access charges. *See* Memorandum Opinion and Order, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd 5986, 5987, ¶ 18 (1987) (under Commission's access charge rules, "entities that offer both interexchange services and enhanced services are treated as carriers with respect to the former offerings, but not with respect to the latter"); *see also* Memorandum Opinion and Order, *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 59 Rad. Reg. 2d (P&F) 1275,

1284-85 n.3 (1986) ("where a cellular company is offering interstate, interexchange service, the local telephone company providing interconnection is providing exchange access to an interexchange carrier and may expect to be paid the appropriate access charge . . . defined by [s]ection 69.5(b) of our rules").

Indeed, *none* of the rationales for the ESP Exemption applies here. The Commission has justified the exemption on the theory that "it is not clear that ISPs use the public switched telephone network in a manner analogous to IXCs" and that, although ILECs are deprived of access charges, they "receive incremental revenue from Internet usage through higher demand for second lines by consumers, usage of dedicated data lines by ISPs, and subscriptions to incumbent LEC Internet access services." *Access Charge Reform Order* ¶¶ 345-346. Here, by contrast, the transmission providers at issue use the PSTN in the same manner as other interexchange carriers – indeed, a Transcom witness recently conceded the point, explaining that the transmission of an ordinary long distance call through Transcom's IP-based system makes no difference in the functions that the local exchange carrier must perform to terminate that call to an end user.[35] Likewise, incumbent LECs receive no "incremental revenue" resulting from the misrouting of interexchange calls through the use of IP, but simply lose out on the "terminating . . . access charges on these calls." *AT&T Order* ¶ 11. PointOne and similarly situated carriers thus use ILEC exchange access facilities simply "as an element in an end-to-end long distance call," rendering the ESP Exemption inapplicable.[36]

---

[35] *See* Transcript of Proceedings at 1082, *In re Transcom Enhanced Services, LLC*, Bankr. No. 05-31929-HDH-11 (Bankr. N.D. Tex. Mar. 29, 2005) (Transcom witness James Beerman Test.) (Ex. J).

[36] FCC 8th Cir. Br. at 75-76; *see also Southwestern Bell*, 153 F.3d at 542 (upholding ESP Exemption on theory that it "do[es] not discriminate in favor of [enhanced services providers], which do not utilize [local exchange carrier] services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges");

In short, where PointOne or any other wholesale transmission provider uses IP to transmit an ordinary PSTN-to-PSTN interexchange call, that call is not transformed into an "enhanced service" but remains a "telecommunications service" subject to access charges. By offering transmission of those calls on standardized terms to all comers, these providers are acting in a common carrier capacity and are liable for access charges under Rule 69.5(b). *See MTS/WATS Order* ¶ 83 (absent an exemption, "full carrier usage charges" apply where a provider "employ[s] exchange service for jurisdictionally interstate communications").

2. In all events, PointOne's status as a common carrier is beside the point. Nothing in Rule 69.5 suggests that a carrier must be a "common carrier" to qualify as an "interexchange carrier" for purposes of the Commission's access charge regime. As explained above, the term "interexchange" refers merely to non-access services or facilities provided as an "integral part of interstate or foreign telecommunications," 47 C.F.R. § 69.2(s), and the term "carrier" can plainly refer to either a "common carrier" or a "private carrier."

The Commission in fact established nearly two decades ago, in *HAP Services*, that "[t]he applicability of interstate carrier charges [under Rule 69.5] does not depend upon whether the entity taking service is a common carrier."[37] Rather, wherever a carrier seeks to interconnect with the PSTN, the only relevant question is whether that carrier "carried interstate traffic for hire between two or more exchanges."[38] If so, "interstate access charges would apply," regardless of whether the carrier is a common carrier or a private carrier. HAP had argued that it was not subject to access charges based on its claim that, in adopting Rule 69.5, the Commission

---

AT&T Order ¶ 15 (emphasizing that the termination of a PSTN-to-PSTN call transmitted using IP "imposes the same burdens on the local exchange as do circuit-switched interexchange calls").

[37] Memorandum Opinion and Order, *HAP Services, Inc. v. Southwestern Bell Telephone Company*, 2 FCC Rcd 2948, ¶ 15 (1987).

[38] *Id.*

precluded application of access charges "to local connections obtained by private carriers."[39] The Commission rejected that interpretation, holding that access charges are applicable to all interstate traffic that is terminated on the PSTN, regardless of whether the carrier that carries that traffic operates as a private carrier or as a common carrier. Indeed, even non-carriers that avail themselves of access services are liable for access charges.[40]

It is no answer to rely on the fact that 47 U.S.C. § 153(10) defines both "common carrier" *and* "carrier" as "any person engaged as a common carrier for hire, in interstate or foreign communication."[41] Any reliance on this provision proves too much. Both the Commission and the courts routinely use the term "carrier" to refer to *non*-common carriers, including "private carriers" and, indeed, *interexchange* "private carriers." *See Triennial Review Order* ¶ 152 ("[A] common carrier holds itself out to provide service on a non-discriminatory basis. A private carrier, on the other hand, decides for itself with whom and on what terms to deal.") (footnote omitted); *Cable Modem Declaratory Ruling*[42] ¶ 54 (describing stand-alone transmission offerings to ISPs as "a private carrier service and not a common carrier service"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("If the carrier chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently, the entity is a private

[39] *Id.* ¶ 12.

[40] *See supra* nn. 3, 24.

[41] Although Rule 69.5(b) applies to interexchange carriers that use local exchange switching facilities "for the provision of interstate or foreign telecommunications services," this rule was written more than a decade before the 1996 Act and, therefore, the Act's definition of "telecommunications services" as an "offering of a telecommunications for a fee directly to the public" (*i.e.*, as a common carrier service) is irrelevant here.

[42] Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"), *aff'd, National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005).

carrier for that particular service") (quoting *National Ass'n of Regulatory Util. Comm'rs*, 533 F.2d 601, 608-09 (1976); *Norlight* ¶¶ 4 & n.5, 23 (concluding that a proposed interexchange service provider would be offering service on a "private carrier" basis); *see also* Declaratory Ruling, *Public Service Company of Oklahoma Request for Declaratory Ruling*, 3 FCC Rcd 2327, ¶ 25 (1988) (distinguishing between "carrier" as used in the Communications Act and "private carriers"). If the term "carrier" always means "common carrier," as PointOne claims, the term "private carrier" would be an oxymoron.

Furthermore, the Commission's regulations do not necessarily adopt the statutory definition in section 153(10). Thus, for example, in at least one instance, the regulations adopt a definition of "carrier" that does *not* track that section. *See* 47 C.F.R. § 21.2 (defining "carrier" as distinct from a "communication common carrier"). Likewise, where the regulations are intended to mimic the statutory definition set out in section 153(10), they do so expressly. 47 C.F.R. § 32.9000 (defining "common carrier" or "carrier" in way that mirrors statutory definition, solely for purposes of Part 32 of Commission's rules). Accordingly, while the word "carrier" *standing alone in the statute* refers solely to a "common carrier," *see* 47 U.S.C. § 152(b) (limiting scope of Commission jurisdiction over "carriers"); *id.* § 214 (setting out certificate requirements for "carriers"), it does not follow that the term "interexchange carrier" in Part 69 of the Commission's rules refers to an "interexchange *common* carrier."

Any other result would not only be flatly inconsistent with Commission precedent but also absurd. As explained at the outset – and as PointOne has conceded[43] – for purposes of switched access charges, Rule 69 encompasses: (1) "end users," which *purchase* interstate or foreign telecommunications service and pay end user charges, and (2) "interexchange carriers"

[43] *See* Pies Letter at 2-3.

that "use local exchange switching facilities for the provision of interstate or foreign telecommunications service" and pay "carrier's carrier" access charges in that circumstance. *See* 47 C.F.R. § 69.5(b). If "interexchange carriers" were confined solely to common carriers, such an interpretation would imply the existence of a discrete third category of entities – *i.e.*, private carriers that are not "customers of an interstate or foreign telecommunications service" and thus are not "end users," but which also do not satisfy the Commission's traditional test for common carriage and, on PointOne's view, thus are not subject to access charges. That result, in turn, would mean that self-styled "private carriers" could transmit and terminate PSTN-to-PSTN traffic (and could "use local exchange switching facilities" in doing so), but nevertheless claim that they are exempt from carrier's carrier access charges because they do not qualify as "common carriers." Nothing in the text or history of the Commission's access charge regulations supports that result.

3. The access charge liability of PointOne and similar carriers is unchanged by the fact that these carriers have avoided purchasing Feature Group D facilities from the SBC ILECs, and instead obtain access to the SBC ILECs' local exchange facilities by routing calls through CLECs. The Commission has identified "three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract." Declaratory Ruling, *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192 ¶ 8 (2002). Here, just as in the *AT&T Order*, the duty to pay access charges arises out of Rule 69.5(b) as well as the SBC ILEC tariffs that PointOne and similar carriers circumvent through improper routing in violation of the filed tariff doctrine. *See AT&T Order* ¶¶ 11 n.49, 12 (concluding that AT&T is liable for access charges on IP-in-the-middle calls routed through CLECs). As the Commission

has held, for purposes of access charges, "affirmative consent [is] unnecessary to create a carrier-customer relationship when a carrier is interconnected with other carriers in such a manner that it can expect to receive access services, and when it fails to take reasonable steps to prevent the receipt of access services and does in fact receive such services." Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶ 188 (1999); *see, e.g., Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 685 (E.D. Va. 2000); Memorandum Opinion and Order, *United Artists Payphone Co. v. New York Tel. Co.*, 8 FCC Rcd 5563, ¶¶ 1-2 (1993). That holding applies here and confirms the Commission's ruling in the *AT&T Order* that an interexchange carrier may not evade an ILEC's access tariffs merely by establishing alternative routing arrangements that circumvent the interconnection facilities that are designed to measure and bill for switched access traffic.

II. PROMPT RESOLUTION OF THESE ISSUES IS VITALLY IMPORTANT TO THE COMMISSION'S ACCESS CHARGE REGIME

Carriers have been evading access charges by misrouting IP-in-the-middle calls through CLECs for years. AT&T filed its petition on this issue in October 2002, and the Commission resolved it in April 2004, with the avowed purpose of providing "clarity to the industry" on what the Commission correctly characterized as a critically important issue. *AT&T Order* ¶ 2. Yet, years after this unlawful behavior started, and fully 18 months after the Commission supposedly put an end to it, for providers such as PointOne – the same providers that fought hammer and tong to support AT&T's petition, *see supra* pp. 11-12 – it is business as usual. These carriers continue to route PSTN-to-PSTN interexchange calls without the payment of access charges, and

they continue to rely on the "ESP Exemption" notwithstanding the Commission's holding that such calls are "telecommunications services" subject to access charges.[44]

The Commission must act promptly to put an end to this charade. The SBC ILECs conservatively estimate that the providers at issue in this petition have *already* deprived the SBC ILECs of more than $100 million in switched access charges, and they have presumably deprived other LECs of untold additional amounts. *See* Dignan Decl. ¶ 9. Moreover, these carriers continue to circumvent more than $1 million per month in switched access charges from the SBC ILECs alone. *See id.*

And that is only the beginning. The district court decision that gave rise to this petition suggests that, in the court's eyes, there is uncertainty over whether wholesale transmission providers using IP technology are liable for access charges. That supposed uncertainty will no doubt yield a spate of new so-called "IP-enabled service providers" that, like PointOne, assert that they are beyond the scope of the *AT&T Order* and are therefore exempt from access charges when they transmit ordinary PSTN-to-PSTN calls. And, although the court's discussion is limited to providers using IP technology, nothing – absent timely action by this Commission – is to stop non-IP-based carriers from likewise doing as PointOne has done – *i.e.*, characterizing themselves as "private carriers" exempt from access charges and establishing routing arrangements designed to bypass access charges.

The Commission has seen this same sequence of events before. In formulating their claim that calls routed using IP are transformed into "enhanced services," AT&T and others

[44] *Compare, e.g.*, Pies Letter at 4 ("PointOne has always purchased McLeod USA's PRI product as an end user, pursuant to FCC Rule 69.5(a), in order to provide IP-enabled services to PointOne customers") *with AT&T Order* ¶¶ 12, 14 (concluding that PSTN-to-PSTN interexchange calls with no enhanced functionality are "telecommunications services" subject to access charges).

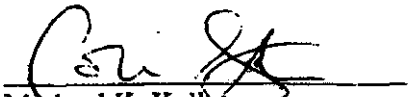
seized on alleged "uncertainty" over the application of access charges supposedly stemming from loose language in a Commission report and a notice of proposed rulemaking, and they used that alleged uncertainty as justification to evade hundreds of millions of dollars in access charges. *See AT&T Order* ¶ 16 (describing and rejecting the claim that the Commission had "waived . . . or otherwise established a carve-out" from access charges for calls carried using IP-in-the-middle). That result, in turn, adversely affected "competition" among interexchange carriers, prevented LECs from "receiv[ing] appropriate compensation for the use of their networks," and undermined "the application of important Commission rules, such as the obligation to contribute to the universal service support mechanisms." *Id.* ¶ 2.

Absent prompt and decisive action, history will no doubt repeat itself, as carriers will seize on the alleged uncertainty created by the district court's *Order* to engage in the same basic routing practices condemned in the *AT&T Order*, but with the addition of a self-styled "private carrier" in the middle. The Commission should act without delay to avoid that result.

CONCLUSION

The Commission should declare that wholesale transmission providers are "interexchange carriers" for purposes of Rule 69.5(b) and are thus liable for access charges when they "use local exchange switching facilities for the provision of an interstate or foreign telecommunications service."

Respectfully submitted,



Michael K. Kellogg
Colin S. Stretch
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036
(202) 326-7900

Jack Zinman
Gary L. Phillips
Paul K. Mancini
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
Washington, D.C. 20005
(202) 326-8800

Martin E. Grambow
Randall Johnson
SBC COMMUNICATIONS INC.
175 E. Houston
San Antonio, Texas 78205
(214) 464-3620

Counsel for the SBC ILECs

September 19, 2005

Table of Exhibits

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SOUTHWESTERN BELL TELEPHONE, L.P., et al.,	)	
Plaintiffs,	)	
vs.	)	No. 4:04-CV-1303 (CEJ)
VARTEC TELECOM, INC., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on the motion of defendants UniPoint Holdings, Inc., UniPoint Services, Inc., and UniPoint Enhanced Services, Inc., to dismiss for failure to state a claim or in deference to the primary jurisdiction of the Federal Communications Commission (FCC). Plaintiffs oppose the motion and the issues are fully briefed.

Plaintiffs in this action are ten Local Exchange Carriers[1] (LECs) that provide telecommunication services in different regions of the country. They seek to recover federal and state tariffs for long-distance telephone calls transmitted by defendants.[2] Plaintiffs allege that defendant VarTec Telecom, Inc. (VarTec) is an interexchange carrier (IXC) that provides long-distance telephone service, using "dial-around" or "10-10" technology. The

---

[1]Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, Nevada Bell Telephone Company, Michigan Bell Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Ohio Bell Telephone Company, Wisconsin Bell, Inc., The Southern New England Bell, Inc., and Woodbury Telephone Company.

[2]Plaintiffs also bring claims for unjust enrichment, fraud, and civil conspiracy.

UniPoint[3] and Transcom[4] defendants are Least Cost Routers (LCRs) with whom VarTec contracts to transmit long-distance telephone traffic in Internet Protocol (IP) format. Defendants VarTec and Transcom Enhanced Services filed bankruptcy petitions in the United States Bankruptcy Court for the Northern District of Texas. Plaintiffs' claims against these defendants are subject to the automatic stay under 11 U.S.C. § 362.

I. Background

A complex regulatory scheme governs the transmission of long-distance telephone calls. LECs provide facilities, known as Feature Group D trunk facilities, to which IXCs deliver long-distance calls for delivery to the LECs' customers. The IXCs pay the LECs terminating access charges, at rates determined by whether the call is an intrastate or interstate call. The LECs maintain separate facilities for local calls, which are compensated at a lower rate. Local calls are routed through separate facilities that lack the capacity to detect and measure long-distance calls. See Petition for Declaratory Ruling that At&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 11 (Order April 21, 2004) (AT&T Access Charge Order) (noting that AT&T's IP telephone calls are terminated through LECs' local business lines rather than Feature Group D Trunks). Plaintiffs allege that defendants improperly deliver

---

[3]UniPoint Enhanced Services, Inc. (d/b/a PointOne), UniPoint Services, Inc., and UniPoint Holdings, Inc.

[4]Transcom Communications, Inc., and Transcom Holdings, LLC.

interexchange calls in IP format to the facilities for local calls in order to avoid paying terminating access charges.

In addition to providing for different compensation regimes, the regulations also distinguish between providers of "telecommunication services"[5] and "enhanced" or "information services."[6] See National Cable & Telecommunications Ass'n v. Brand X Internet Services, 125 S. Ct. 2688, 2696 (June 27, 2005) (discussing telecommunications and information services). To date, the FCC has declined to treat providers of enhanced or information services as common carriers, in order to promote growth in the field. Information service providers are thus exempt from tariffs governing access charges. AT&T Access Charge Order at ¶ 4; see also Brand X at 2696.

The introduction of IP telephony, including Voice Over Internet Protocol (VoIP) technology, blurs the distinction between telecommunication and enhanced services. VoIP technologies enable

---

[5]The Telecommunications Act of 1996 defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[6]An enhanced service "involves some degree of data processing that changes the form or content of . . . transmitted information." Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 2004 WL 856557, 19 F.C.C.R. 7457, at ¶ 4 (Order April 21, 2004). The statute defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

real-time delivery of voice and voice-based applications. AT&T Access Charge Order at ¶ 3. When VoIP is used, a communication traverses at least a portion of its path in an IP packet format using IP technology and IP networks. Id. VoIP can be transmitted over the public Internet or over private IP networks, using a variety of media. Id.

On April 21, 2004, the FCC addressed the petition of telecommunications provider AT&T. AT&T sought a declaratory ruling that its VoIP transmission of telephone calls over its Internet system was exempt from access charges. The FCC described the service under consideration as:

> an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PTSN); and (3) undergoes no net protocol conversion[7] and provides no enhanced functionality to end users due to the provider's use of IP technology.

Id. at ¶ 1. The FCC's consideration was limited to those VoIP services employing "1+ dialing." Id. at ¶ 15 n.58.

The FCC determined that AT&T's specific service was a telecommunications service, rather than an enhanced service, and was subject to the access charges.[8] Id. at ¶ 12. In order to

---

[7]No net protocol conversion occurs because the telephone transmissions begin and end as ordinary telephone calls.

[8]The FCC noted that it had recently adopted a Notice of Proposed Rulemaking concerning IP-enabled services. Id. at ¶ 2. In the interim, however, there was "significant evidence that similarly situated carriers may be interpreting [the] current rules differently" with "significant implications for competition." Id. The FCC stated that it adopted its ruling on this matter to provide clarity to the industry pending the outcome of the comprehensive rulemaking proceedings. Id.

avoid placing AT&T at a competitive disadvantage, the FCC ruled that all interexchange carriers providing IP telephony are required to pay access charges for calls that "begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN." Id. at ¶ 18. This rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so. Id.

II. Discussion

According to the allegations in the complaint, when a VarTec long-distance customer makes an interstate call, the call originates on an LEC's network, is handed off to VarTec on the PSTN, is converted to, and transmitted in, IP Format, is reconverted for transmission over the PSTN, and is returned to an LEC for delivery to the called party. The UniPoint and Transcom defendants, according to plaintiffs, provide the IP transmission of the telephone call. Plaintiffs allege that the service defendants provide is identical to that addressed in the FCC ruling and, thus, subject to access charges. The UniPoint defendants contend that only interexchange carriers are liable for access charges under the existing regulatory scheme, that the AT&T Access Charge Order did not alter this rule, and that plaintiffs fail to allege that UniPoint is an interexchange carrier.

Current FCC Rule 69 regulates access charges. 47 C.F.R. Part 69. There are two classes of access charges: "end user charges," which are not at issue in this dispute, and "carriers' carrier charges". 47 C.F.R. § 69.4(a) and (b). A "carriers' carrier" is

a company that owns a telecommunications infrastructure and sells access to it on a wholesale basis. In re Flag Telecom Holdings, Ltd. Securities Litigation, 308 F. Supp. 2d 249, 252 (S.D.N.Y. 2004). Section 69.5(b) states that "carriers' carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." (emphasis added).

Plaintiffs do not contend that they are entitled to collect access charges from the LCR defendants under Rule 69.5. They argue, rather, that because the defendants acting together provide a service identical that provided by AT&T alone, the defendants are liable for access charges, without regard to whether they are IXCs.

The FCC ruled in the AT&T Access Charge Order that,

> when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.

Id. at ¶ 19 (emphasis added). Under this language, plaintiffs have stated a claim against defendant VarTec, whom plaintiffs clearly allege to be an interexchange carrier providing a service covered by the order. Nothing in the AT&T Access Charge Order extends the obligation to pay terminating access charges to non-IXCs, however, and plaintiffs do not allege that the UniPoint defendants are an IXC.

Finally, an entity's involvement in the transmission of IP-enabled interexchange calls does not automatically subject it to terminating access charges. Id. at ¶ 23 n. 92 ("to the extent that terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant . . . tariffs provide otherwise.")

The UniPoint defendants ask the Court to dismiss plaintiffs' claims for failure to state a basis for relief or to defer to the primary jurisdiction of the FCC. They note that the FCC has ongoing proceedings concerning VoIP. See In the Matter of IP-Enabled Services, FCC No. 04-28 (Notice of Proposed Rulemaking, March 10, 2004).[9] Among the issues upon which the FCC is seeking comment are (1) "the extent to which access charges should apply to VoIP and other IP-enabled services," and (2) how to classify the providers of these services. Id. at ¶ 61.

Primary jurisdiction is a common-law doctrine that is utilized to coordinate judicial and administrative decision making. Access Telecommunications v. Southwestern Bell Telephone Co., 137 F.3d 605, 608 (8th Cir. 1998). The doctrine "applies where enforcement of a claim originally cognizable in a court requires the resolution of issues which, under a regulatory scheme, have been placed within the special expertise and competence of an administrative agency."

The FCC Notice can be found at:
http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-28A1.pdf

Southwestern Bell Tel. Co. v. Allnet Comm. Servs., Inc., 789 F.Supp 302, 304 (E.D. Mo. 1992). The purposes of the doctrine are to: (1) ensure desirable uniformity in determinations of certain administrative questions, and (2) promote resort to agency experience and expertise where the court is presented with a question outside its conventional expertise. United States v. Western Pac. R.R. Co., 352 U.S. 59, 63-64 (1956).

Plaintiffs argue that deferral to the FCC is inappropriate because this matter concerns tariff enforcement, an issue beyond the authority of the FCC. See Access Charge Order at ¶ 23 n.93 ("Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariff charges."). However, in order to determine whether the UniPoint defendants are obligated to pay the tariffs in the first instance, the Court would have to determine either that the UniPoint defendants are IXCs or that access charges may be assessed against entities other than IXCs. The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC. The Court's entrance into these determinations would create a risk of inconsistent results among courts and with the Commission. The FCC's ongoing Rulemaking proceedings concerning VoIP and other IP-enabled services make deferral particularly appropriate in this instance. And, because the FCC may determine that LCRs are interexchange carriers in the transmission of IP telephony, dismissal for failure to state a claim is inappropriate.

Having determined that deferral on plaintiffs' claims for access charges is appropriate, the Court must decide whether to dismiss the action without prejudice or stay the matter while the parties resolve the issue before the FCC. Neither party has requested a stay and the Court will thus dismiss the UniPoint defendants. Plaintiffs' allegations with regard to the Transcom defendants[10] are identical to those regarding the UniPoint defendants and thus plaintiffs' claims against these defendants will be dismissed as well. Because of the bankruptcy proceedings involving the remaining defendants, VarTec and Transcom Enhanced Services, the Court shall direct the Clerk of Court to administratively close the case as to those defendants.

Accordingly,

IT IS HEREBY ORDERED that the motion of UniPoint Holdings, Inc., UniPoint Services, Inc., and UniPoint Enhanced Services, Inc., to dismiss for failure to state a claim or in deference to the primary jurisdiction of the Federal Communications Commission [#57] is **granted in part and denied in part.**

IT IS FURTHER ORDERED that plaintiffs' claims against the UniPoint defendants are **dismissed without prejudice.**

IT IS FURTHER ORDERED that plaintiffs' claims against defendants Transcom Holdings, LLC, and Transcom Communications, Inc., are **dismissed without prejudice.**

---

[10]Transcom Holdings, LLC, and Transcom Communications, Inc.